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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

D.D.,

Petitioner,

v.

THE SUPERIOR COURT OF LOS  
ANGELES COUNTY,

Respondent;

LOS ANGELES COUNTY DEPARTMENT  
OF CHILDREN AND FAMILY SERVICES,

Real Party in Interest.

B220608

(Los Angeles County  
Super. Ct. No. CK62981)

ORIGINAL PROCEEDINGS in mandate. D. Zeke Zeidler, Judge. Petition granted.

Law Offices of Alex Iglesias, Steven D. Shenfeld and Donna Bernstein for Petitioner.

No appearance for Respondent.

James M. Owens, Assistant County Counsel, and Jacklyn K. Louie, Deputy County Counsel, for Real Party in Interest.

## INTRODUCTION

D.D., a designated prospective adoptive parent (PAP), brought a petition for extraordinary writ challenging the order of the juvenile court removing three-year-old M., from her care. (Welf. & Inst. Code, § 366.26, subd. (n).)<sup>1</sup> D.'s sole contention is that the juvenile court denied her due process by refusing to allow her to call witnesses at the removal hearing. For the reasons explained herein, we grant writ petition.

## FACTUAL AND PROCEDURAL BACKGROUND

In July 2006, when M. was six months old, the juvenile court declared her a dependent of the court (§ 300, subds. (b) & (g)) and eventually placed her with her maternal cousin, Ms. H. In January 2007, the same month the juvenile court terminated reunification services for M.'s mother and set the section 366.26 hearing, Ms. H. requested that the Department of Children and Family Services (the Department) remove the child from her care. D., another maternal relative, expressed interest in taking the child and in February 2007, the court ordered M. placed with D. notwithstanding D.'s Live Scan and other assessments were incomplete. D. wished to adopt M.

There is no dispute that M. is highly adoptable and 16 families were identified as possible matches, including Ms. H. There is similarly no dispute that D. and the child are bonded. D.'s home study was approved in August 2007. At the section 366.26 hearing held in September 2007, the juvenile court found by clear and convincing evidence that M. was adoptable and terminated her parents' rights.

The Department began encountering impediments to finalizing M.'s adoption. Specifically, D. had financial and housing issues. There was an unidentified man or men possibly living in D.'s and M.'s house who had not been live scanned. The Department had conflicting information indicating that D. was actually married to a man, Mr. S., with an extensive criminal history. A live scan, eventually conducted on Mr. S., the man M. said was her "daddy," revealed extensive criminal history involving drugs, robbery, and domestic violence. Also, the Department had discovered that M.'s daycare arrangement

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<sup>1</sup> All further statutory references are to the Welfare and Institutions Code, unless otherwise noted.

during the long hours that D. was commuting to work was unacceptable. In April, the Department put a hold on the adoption pending confirmation that an appropriate daycare provider had been found.

With these issues still unresolved in October 2009, the Department filed a notice of emergency removal (§ 366.26, subd. (n)), seeking to remove M. from D.'s custody. The notice cited (1) D.'s failure to be straightforward about her marital status; (2) the CLETS report on her apparently-current husband revealing eight felony convictions; and (3) no verification about who was caring for the child when D. was at work. That same month, the Department notified D. that it rescinded her adoption home study and provided her with information about how to contest the decision. Recognizing M. and D. had a "mother-daughter relationship," concerns raised by these outstanding issues prompted the Department to remove M. from D.'s care and place her again with Ms. H.

D. was present in court in early October 2009, although she had not filed an opposition to the Department's notice of emergency removal. The juvenile court set a hearing on the removal petition for October 29, 2009, after deeming D.'s opposition to have been orally made. That same day, the court declared D. a prospective adoptive parent, appointed her counsel, and declared her a de facto parent, "for purposes of the appointment." The court put the social workers, the person responsible for the home study's rescission, and the former caregiver on call for the hearing.

D.'s counsel requested a continuance of the removal hearing to prepare and so the court continued the matter to November 2009.

The Department submitted its assessment of D. and explained that there was substantial danger to M. posed by D.'s housing and financial instability, uncertain marital status, and the unknown men in D.'s house who had not been live scanned. The Department did not recommend legal guardianship for the same reasons it was requesting M.'s removal from D.

At the contested removal hearing, D. was unwilling to waive confidentiality of the adoptive home study documents. The court declared D. to be a PAP. It then listed the documents it was reviewing: the Department's notice of emergency removal, the

Department's last minute information for the court with attached notices; and the Department's status review reports from October 29, 2009, October 2, 2009, April 20, 2009, and November 13, 2009. The court asked whether anyone wished to submit additional documentary evidence. D.'s attorney had no documents but wanted to call D. or Ms. H. to the stand, both of whom were present in the courtroom. The court declined to hear testimony, over D.'s objection, explaining, "[a]lthough the prospective adoptive parent is entitled to a hearing, the case law is pretty vague as to what a hearing is and whether hearings necessarily require the court to consider testimony of witnesses." The court noted D. could have filed opposition and affidavits or declarations and that the matter had been continued at her attorney's request for more time to prepare. D.'s attorney proposed an offer of proof, but the Department refused to stipulate to it. The court requested and heard extensive argument from D.'s attorney in an attempt to respond to the concerns raised by the Department. M.'s attorney argued that the child should be returned to D. because she wanted to return and there was no evidence to suggest a risk if she were returned, with the result it was in the child's best interest to be with D. At the close of argument, the court rescinded D.'s PAP and de facto parent status. D.'s writ petition followed.

### CONTENTIONS

D. contends the juvenile court erred by not considering all available information and denied her due process by failing to allow her the opportunity to be heard and participate in the removal hearing.

### DISCUSSION

Section 366.26, subdivision (n) governs the procedure for judicial review of both emergency and nonemergency removals of dependent children from a PAP. (§ 366.26, subd. (n)(3) & (4).) Subdivision (n) provides, at or after a hearing to determine whether parental rights over a dependent child should be terminated, that the juvenile court may

designate the child's caretaker a PAP.<sup>2</sup> When, as here, the Department decides to remove a child from the custody of a judicially designated PAP, and the PAP timely objects to

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<sup>2</sup> In relevant part, section 366.26, subdivision (n) reads: “(1) [T]he court, at a hearing held pursuant to this section or anytime thereafter, may designate a current caretaker as a prospective adoptive parent if the child has lived with the caretaker for at least six months, the caretaker currently expresses a commitment to adopt the child, and the caretaker has taken at least one step to facilitate the adoption process. . . .

“(3) Prior to a change in placement and as soon as possible after a decision is made to remove a child from the home of a designated prospective adoptive parent, the agency shall notify the court, the designated prospective adoptive parent or the current caretaker, if that caretaker would have met the threshold criteria to be designated as a prospective adoptive parent pursuant to paragraph (1) on the date of service of this notice, the child's attorney, and the child, if the child is 10 years of age or older, of the proposal . . . .

“(A) Within five court days or seven calendar days, whichever is longer, of the date of notification, the child, the child's attorney, or the designated prospective adoptive parent may file a petition with the court objecting to the proposal to remove the child, or the court, upon its own motion, may set a hearing regarding the proposal. . . . A caretaker who would have met the threshold criteria to be designated as a prospective adoptive parent pursuant to paragraph (1) on the date of service of the notice of proposed removal of the child may file, together with the petition under this subparagraph, a petition for an order designating the caretaker as a prospective adoptive parent for purposes of this subdivision.

“(B) A hearing ordered pursuant to this paragraph shall be held as soon as possible and not later than five court days after the petition is filed with the court or the court sets a hearing upon its own motion, unless the court for good cause is unable to set the matter for hearing five court days after the petition is filed, in which case the court shall set the matter for hearing as soon as possible. At the hearing, the court shall determine whether the caretaker has met the threshold criteria to be designated as a prospective adoptive parent pursuant to paragraph (1), and whether the proposed removal of the child from the home of the designated prospective adoptive parent is in the child's best interest, and the child may not be removed from the home of the designated prospective adoptive parent unless the court finds that removal is in the child's best interest. . . . If the caretaker was designated as a prospective adoptive parent prior to this hearing, the court shall inquire into any progress made by the caretaker towards the adoption of the child since the caretaker was designated as a prospective adoptive parent.

“(C) A determination by the court that the caretaker is a designated prospective adoptive parent pursuant to paragraph (1) or subparagraph (B) does not make the caretaker a party to the dependency proceeding nor does it confer on the caretaker any standing to object to any other action of the department or licensed adoption agency,

the removal, the juvenile court must promptly set a hearing and may order removal if it finds by a preponderance of the evidence that removal is in the child's best interest. (§ 366.26, subd. (n)(3)(B); *Wayne F. v. Superior Court* (2006) 145 Cal.App.4th 1331, 1334 & 1339-1340 (*Wayne F.*); see also Cal. Rules of Court, rule 5.727.)

Subdivision (n) of section 366.26 sets out the procedure for notice and hearing into the dependent child's removal from a designated PAP, but it does describe how the hearing should be conducted. D. argues that the statute does not limit the type of proof offered at the hearing; the Department counters that the statute does not require live testimony be taken.

The court in *Wayne F.* examined the legislative intent behind section 366.26, subdivision (n)(3) and concluded, "full participation of PAP's at removal hearings is the most effective means of meeting the Legislature's expressed direction that the juvenile court, rather than a social service or adoption agency, determine whether removal is in a child's best interest." (*Wayne F.*, *supra*, 145 Cal.App.4th at p. 1342.) *Wayne F.* reasoned, "[i]f, at a removal hearing, the juvenile court were permitted only to hear evidence and argument from a social service or adoption agency, as a practical matter the juvenile court would be required to defer to the determination of the only active litigant in the courtroom. Such a one-sided process would not permit the juvenile court to exercise the independent judgment the Legislature plainly intended." (*Id.* at p. 1341.)

Accordingly, subdivision (n) of section 366.26 confers on designated PAPs a measure of due process, i.e., notice and an opportunity to object (§ 366.26, subd. (n)(3)(A)-(C)), and limited standing entitling them to participate fully in a removal hearing held under that subdivision (*id.* at subd. (n)(3)(C)). *Wayne F.* explained, "*subject to the same discretion the juvenile court exercises over any litigant* appearing before it, in any hearing under subdivision (n) designated PAP's, like other litigants, may offer evidence, examine witnesses, provide the court with legal authorities and make

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unless the caretaker has been declared a de facto parent by the court prior to the notice of removal served pursuant to paragraph (3). . . ."

arguments to the court.” (*Wayne F.*, *supra*, 145 Cal.App.4th at pp. 1334 & 1343, italics added.)

“In juvenile dependency litigation, due process focuses on the right to notice and the right to be heard. ‘A meaningful hearing requires an opportunity to examine evidence and cross-examine witnesses, and hence a failure to provide parents with a copy of the social worker’s report, upon which the court will rely in coming to a decision, is a denial of due process.’ [Citation.]” (*In re Matthew P.* (1999) 71 Cal.App.4th 841, 851.)

*Matthew P.* determined that a full hearing, rather than limiting evidence to declarations, was required on a section 388 petition, an analogous procedure. (*Ibid.*) In a section 388 hearing, the court must balance the interest of the de facto parents in regaining custody of the dependent children and in telling their side of the story about what they believe is in the children’s best interest against the Department’s interest in serving the best interests of the children by resolving dependencies expeditiously and giving the juvenile court wide latitude to control dependency proceedings. (*Ibid.*) To consider the section 388 petition only on documentary evidence, the court held, would be to deny the petitioners the opportunity to be heard. (*Ibid.*) The *Matthew P.* court explained, “‘[t]he de facto parenthood doctrine . . . recognizes that persons who have provided a child with daily parental concern, affection, and care over substantial time may develop legitimate interests and perspectives, and may also present a custodial alternative, which should not be ignored in a juvenile dependency proceeding.’ [Citation.] The denial of the [de facto parent’s] motion rests entirely on the content of the social services reports. Given their three-year history with the boys, including their undisputed care and concern for them, and their allegations that the social workers’ statements were inaccurate, the court should not have exercised its discretion under [former Cal. Rules of Court,] rule 1432(f). That rule is not absolute and does not override due process considerations. [Citation.]” (*In re Matthew P.*, *supra*, at p. 851.)

Based on *Wayne F.* and following the reasoning of *Matthew P.*, we conclude that the juvenile court abused its discretion and denied D. due process. Dionne is both a PAP

and a de facto parent, with the result she has a legitimate interest in maintaining custody of the child. She has raised M. for three years and the two have an admittedly close, bonded relationship. Accordingly, D. has standing and a justifiable interest in “telling her side of the story,” by explaining the findings in the adoption report, and in describing what she believes is in M.’s best interest. We recognize that the Department carries the burden to demonstrate that removal is in M.’s best interest. But, by basing the removal order solely on the Department’s reports without hearing D.’s clarification of the Department’s concerns, the court effectively deferred its determination to one litigant, and therefore failed to exercise its independent judgment. (*Wayne F.*, *supra*, 145 Cal.App.4th at p. 1341.)

We recognize that the juvenile court has wide latitude to control dependency proceedings. Yet here, scheduling the removal hearing, the court ordered that the social workers responsible for the home study’s rescission and the former caregiver be put on call for the hearing, suggesting the court was contemplating hearing testimony. Nothing in the order setting the hearing signaled the court’s intention to limit evidence to declarations and affidavits. D.’s witnesses were present in the courtroom, and so no further continuances would have been necessary to hear her evidence. D. even attempted to make an offer of proof. Given the court’s setting order, its sudden refusal to allow D.’s witnesses to testify, or to hear her offer of proof, was arbitrary and capricious and denied D. an opportunity to be heard.

The Department argues D. did not suffer prejudice because the court would have reached the same result even had it heard the evidence. However, because the court declined to hear D.’s offer of proof or her evidence, there is nothing in the record on which to conduct a prejudice analysis.

## DISPOSITION

Let a writ issue directing the juvenile court to hold a new hearing under subdivision (n) of section 366.26 to allow the Department and the PAP to examine witnesses and present evidence or make an offer of proof, subject to the same discretion the juvenile court exercises over any litigant that appears before it. The stay of December 21, 2009 is lifted.

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ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.